No. 7771

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY, a corporation,
Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Appellant

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INDEX

Page

STATEMENT 1

MANNER IN WHICH QUESTIONS ARISE 7

SPECIFICATION OF ERRORS RELIED UPON 12-a

ARGUMENT:

Proposition of Law I.......................... 13

A common carrier to whom company material is consigned may participate in the transportation charge where the shipment originating on the line of another carrier is destined to a point on the line of the consignee carrier and the consignee carrier performs part of the transportation service 13

Proposition of Law II.......................... 40

The essential nature of the shipment determines the character thereof, and the mere insufficiency or incorrectness of the billing does not affect the same. The Court will look to the essential character of the shipment intended by the parties irrespective of the billing................ 40

Proposition of Law III.......................... 44

Estoppel 44

AUTHORITIES CITED

Page

Baltimore & Ohio S. W. Co. v. Settle, 260 U. S. 166, 43 S. Ct. 28 41

Davis v. Wakelee, 156 U. S. 689 44

Davis and Rankin Bldg. & Mfg. Co. v. Dix, 64 Fed. 406, 410, 411 44

Ill. Cent. R. Co. v. De Fuentes, 136 U. S. 157 41

Lorane Mfg. Co. v. Oshinsky, 182 Fed. 407 45

Mississippi River & Bonne Terre R. Co. v. Director General, 55 ICC 677 13

Oakland Sugar Mills v. Wolfe Co. (CCA) 118 Fed. 248 44

Polson Logging Co. v. Neumeyer, 229 Fed. 707 .. 45

Railway Co. v. McCarty, 96 U. S. 258, 267 ......44, 46

Rates on Railroad Fuel and Other Coal, 36 ICC 1 . 13, 41

Smith v. Boston Elevated R. Co., 184 Fed. 389 ... 44

Southern Cotton Oil Co. v. Shelton, 220 Fed. 256 . 45

Tuckerton R. Co. v. Penn. R. Co., 52 ICC 319 ... 13, 41

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346 . 41

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Brief of Appellant

STATEMENT

For convenience in this brief we will refer to The Northern Pacific Terminal Company of Oregon as the NPT Co., or the Terminal Company, and the Spokane, Portland & Seattle Railway Company as the S. P. & S. Co.

The main question involved in this case is whether or not the NPT Co. is entitled to participate as a carrier with the S. P. & S. Co. in the switching charges for the transportation of fuel oil in carload lots from oil plants located within the limits of Portland, Oregon,

switching district on the line of the S. P. & S. destined to the oil storage tank in the Guilds Lake District on the line of the NPT Co. also within the switching limits of Portland switching district where the shipments were billed to the NPT Co. at Guilds Lake and were for use as fuel for the engines of the NPT Co. and required a transportation service by the NPT Co. from the point of interchange between the lines of the S. P. & S. and NPT Co. to reach the oil storage tank on the line of the NPT Co.

Both the interchange track and the oil storage tank of the NPT Co. are in what is known as the Guilds Lake District. The switching rate from the point of shipment on the line of the S. P. & S. to the oil storage tank of the NPT Co. was the same as the rate to the interchange point by reason of the fact that the switching rates in the Portland switching district were established on the zone basis and all switching rates from points in one zone to all destinations in a particular zone are the same. In establishing the point of interchange between the lines of the parties to this case the line receiving shipments of cars from the other, designates the point of interchange, that is, the point where the receiving line will receive shipments of cars from the other. The NPT Co. designated as the interchange track at which it would receive shipments from the S. P. & S., a track in the make-up and break-up yard in Guilds Lake. This yard is located in the Guilds Lake district alongside the main track of the S. P. & S. Except for making an interchange to the NPT Co. the S. P. & S. had no right to come upon any track in

Guilds Lake. After the shipments were placed upon the interchange track in order to reach the oil storage tank in Guilds Lake it required the Terminal Company to segregate the oil tanks destined to it at Guilds Lake from the entire interchange shipments, pulling them a distance from three-quarters to a mile through a switch and spot them at the oil storage tank where pumping facilities were located to pump the oil into the storage tank.

Under the agreement of the carriers, parties to the Portland switching zone tariff, it is provided that the rate shall be divided equally between the carriers participating in the transportation. In this case the NPT Co. claims that two parties participated, to wit: the S. P. & S. and the NPT Co. and that the NPT Co. was entitled to half the switching charges for its transportation service. The S. P. & S. claims that had the shipments been billed to the NPT Co. at the storage tank at Guilds Lake instead of simply to Guilds Lake the NPT Co. would have been entitled to one-half the switching charge, but being billed simply to the NPT Co. at Guilds Lake the transportation service was completed at the interchange track and therefore the S. P. & S. was entitled to the entire switching charge. The NPT Co. maintains that the shipments were at all times destined to the oil storage tank at Guilds Lake, that it had no part in the billing of the shipment, that the S. P. & S. at all times knew that the shipments were destined to the oil storage tank, that it made the billing and if there was any doubt in its mind or there was any necessity to designate the particular track on which said

shipments were to be delivered it was its duty to ascertain from the shipper the actual destination in view of the fact that both the interchange point and the oil storage tank were in what is known as Guilds Lake or Guilds Lake district, and furthermore, on August 18, 1926, it was specifically advised in writing that all the shipments so being transported were so destined. The shipments were moving on an average of almost a car a day, at least several cars a week.

The shipments started to move on the 1st day of February, 1923. The parties were unable to agree as to the rule to be applied, the Terminal Company maintaining that it was entitled to one-half of the switching charge, and on August 18, 1926, the Comptroller of the Terminal Company made written demand of the agent of the S. P. & S. for its proportion of the switching charge. On the 26th day of August, 1926, the General Freight Agent of the S. P. & S. declined to recognize the claim, not on the basis that the shipments were not billed to the fuel oil spur, but upon the ground that inasmuch as the shipments were consigned to the Terminal Company the S. P. & S. after placing them on the interchange track had no further interest in the shipments and that to share the charge with the Terminal Company would be rebating. Later, however, the S. P. & S. recognized the right of the Terminal Company to participate in the switching charge and paid the Terminal Company one-half the switching charge for all shipments moving after April 1, 1929. It is these payments that the S. P. & S. seeks to recover in this case and was allowed to do so by the lower court.

On September 20, 1933, the S. P. & S. filed its complaint in the lower court in which it alleged that between April 1, 1929 and January 4, 1930, it had transported from Willbridge, within the City of Portland, 286 carload shipments of fuel oil to Guilds Lake yard and delivered the same to the defendant, that it had on file both with the Interstate Commerce Commission and with the Public Service Commission of Oregon a published tariff which stated the rate to be $8.55 per car, that the total charges on said 286 cars was the sum of $2445.30, and further alleges that between the 8th day of January, 1930, and the 4th day of January, 1932, it transported from Linnton, within Portland, Oregon, 644 cars of fuel oil to the Guilds Lake yard, and there delivered the same to the defendant, that the total charges on 644 cars was the sum of $5670.56, that between the 2nd day of January, 1932, and the 28th day of March, 1932, it transported 87 cars to the Guilds Lake yard and delivered the same to the defendant, the charges on these 87 cars were $9.40 per car, and the total charges were $817.80; that the total charges for all said shipments were $8933.66. It further alleges that the defendant was not a participating carrier and was not entitled to share in said charges, and that through mistake the S. P. & S. had not charged or collected the full amount specified in the applicable tariff, and that defendant was indebted to the plaintiff in the amount of such allowance and payment so mistakenly made in the total sum of $4466.83, being one-half of the total charges for such shipments. (Tr. 2-6.) In answer the defendant, appellant here, denied that

anything was due from the appellant to appellee, admitted, with the exception of an immaterial error as to the number of shipments moving, that the shipments had moved, admitted the amount of the rate as established by the tariff, maintained that the Terminal Company was a participating carrier and entitled to one-half the rate. (Tr. 7-12.) As a separate answer and defense the Terminal Company set up that it was a party to the Portland Switching zone tariff, together with the S. P. & S., and other carriers within the Portland switching zone, set up the rates established by the tariff, that both the originating point and destination point were within the same zone, to wit: zone 5, established by the tariff, set up the fact that the Terminal Company had designated a track in the Guilds Lake yard as the point of interchange on shipments moving to the Terminal Company from the S. P. & S., that the Terminal Company had participated in the transportation service and was entitled to one-half the switching charges applying on such shipments. That on the shipments from the Standard Oil Company plant at Willbridge the Terminal Company had purchased the oil f. o. b. the fuel oil spur in the Guilds Lake terminal, and that said shipments were the shipments moving up to January 4, 1930, and that on the shipments moving from the Richfield Oil Company, being those moving subsequent to January 4, 1930, the oil was purchased f. o. b. Richfield Oil Company spur at Linnton, and that the Terminal Company was entitled to one-half the revenue on all said shipments. As a second defense the defendant sets up a counterclaim

by reason of the shipments made, and that it was entitled on account of said shipments to recover of and from the S. P. & S. the sum of $8620.49. (Tr. 12-20.) A reply was filed on the 21st day of December, 1933, putting in issue the separate answers and defenses of the Terminal Company.

After trial by the Court without a jury, the lower court made findings and gave judgment in favor of the plaintiff in the sum of $4,440.22, interest at 6% from April 26, 1932, and costs.

Manner in Which Question Arises

The main question in this case arises in the following manner: the case was tried to the Court without a jury, a jury having been waived by stipulation in writing. Before the case was submitted to the Court the defendant requested of the Court, rulings on questions of law as follows:

> "(1) Whether or not in connection with the transportation of company material, consigned to a common carrier, where the receiving carrier and the consignee carrier have entered into joint tariffs providing rates from points on the initial carrier to points on the consignee carrier, it is as a matter of law necessary that the bill of lading shall specify the particular track upon the line of the consignee carrier at which such shipment is to be delivered where the junction point of the lines of the two carriers and the track of the consignee carrier on which said shipment is to be delivered, are both within the district as shown as the destination of said shipment and the track on which delivery was made and intended to be made at the time of the delivery of the shipment to the initial carrier can-

not be reached by the line of the initial carrier, and where the initial carrier at the time of receiving the shipment had knowledge of the particular track on which said shipment was intended to be made and at which it was actually made.

"The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted." (Tr. p. 104.)

"(2) Whether or not it was the duty of the initial carrier, on receiving a shipment of company material, consigned to a connecting consignee carrier, and by the joint tariffs of the two carriers the same rate applies not only to the point of junction of the two carriers, but to other points on the line of the consignee carrier at which delivery could not be made by the initial carrier to require definite instructions as to the actual track at which delivery is to be made, and insert the same in the bill of lading issued for said shipment by the initial carrier, or to require specific instructions as to the track of delivery [95] and see that proper instructions are given for such delivery where the junction point of the lines of the two carriers and the track of delivery are both within the description of the destination as actually inserted in the bill of lading issued by the initial carrier.

"The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted." (Tr. p. 105.)

In addition to the foregoing requests on the rulings on questions of law the defendant requested findings of fact and conclusions of law on the theory of the case contended by the defendant was established by the evidence and the law applicable thereto. (Tr. 106-113.)

These requested findings cover the question of the character of Guilds Lake and the tracks and other facilities located thereon. (Requested Finding No. III.)

The location of the oil tank for storage of fuel oil. (Requested Finding No. IV.)

That the plaintiff had no right to make delivery in said Guilds Lake District. (Requested Finding V.)

The establishment of the tariff rate by proper publication and filing. (Requested Findings VI and VII.)

Division of the rate agreed upon. (Requested Finding VIII.)

The shipments purchased from the Standard Oil Company were on contracts for delivery f. o. b. at the oil tank at Guilds Lake. (Requested Finding IX.)

That the subsequent shipments were sold f. o. b. seller's plant. (Requested Finding X.)

The making of the shipments and contract of carriage between the plaintiff and the seller of the oil, the designation of consignee and destination and routing contained in the bill of lading. (Requested Finding XI.)

That the shipments were transported by the S. P. & S. to the interchange track and from the interchange track were transported to the oil storage tank at Guilds Lake by the defendant. (Requested Finding XII.)

The balance of the requested findings were with reference to the number of cars shipped between certain

dates, the revenues earned, and the amount of charges claimed by defendant under its right to one-half thereof. Finally, the fact that the plaintiff had full knowledge at all times after the 26th day of August, 1926, when the shipments were made of the destination thereof at the storage tank in Guilds Lake. (Requested Finding XVI.)

The conclusions of law requested particularly material to the main question here involved were:

(1) That the defendant had the right to participate in the rate charged where the transportation service extended beyond the junction of the tracks of the two parties. (Requested Conclusion I.)

(2) That it was the duty of the plaintiff who issued the bill of lading to see that the proper destination was designated or secure sufficient information to make the destination definite. (Requested Conclusion II.)

(3) That the bills of lading issued sufficiently showed that the transportation service extended onto the line of the defendant. (Requested Conclusion III.)

(4) That irrespective of any alleged insufficiency of the bill, the plaintiff had knowledge of the destination of such shipments. (Requested Conclusion IV.)

(5) That with knowledge of the actual track to which the shipment was to be delivered it was not necessary that said destination be specifically designated in the bill of lading. (Requested Conclusion V.)

(6) That the defendant participated as a common carrier in each and all of the shipments and is entitled

to collect half the charge. (Requested Conclusion VI.)

The balance of said conclusions relate to the amount earned and the amount defendant was entitled to recover. These requests for findings and conclusions are found on pages 106 to 113 of the transcript. These requests were submitted to the Court before the submission of the cause and each and all of said requested findings and conclusions were denied separately and disallowed and to the denial and refusal of the Court to make each of said requested findings and conclusions an exception was allowed. (Tr. 114.)

The defendant, before submission of said cause, also requested and moved the Court for judgment in its favor and specific form of judgment submitted giving judgment in the amounts claimed by the defendant for its share of the switching charges. (Tr. 115-116.) Said request and motion was denied by the Court and to its refusal an exception was taken and allowed (Tr. 116.)

The request for rulings on questions of law above referred to are preserved in Assignments of Error I and II. (Tr. 126-127.)

The request for Findings of Fact as hereinbefore outlined are preserved in Assignments of Error V to XVIII. (Tr. 127-130.)

The error of the Court in refusing to make the Conclusions of law are preserved by Assignments of Error XIX to XXVII, inclusive. (Tr. 130-131.)

The error of the Court in refusing to make and enter the judgment requested by the appellant is preserved in Assignment of Error XXVIII. (Tr. 131.)

In addition to the foregoing the plaintiff in this case requested certain findings of fact and conclusions of law which were allowed by the Court. Appellant filed objections to Finding of Fact III. (Tr. 117.) Finding of Fact V (Tr. 118), Finding of Fact VII (Tr. 119) and particularly to that portion of said findings in which plaintiff requested and which were subsequently allowed by the Court a finding that the shipments in question were transported by the plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipments and at Guilds Lake were delivered to the defendant. These objections were overruled by the court and an exception was allowed to the defendant in each case. (Tr. 118, 119, 121, 122, 123.) These errors are preserved by Assignments of Error XXIX, XXX and XXXI, it being the claim in this particular that no delivery was made by plaintiff at Guilds Lake but merely an interchange and that further transportation service was performed by appellant in transporting said shipments to their intended destination in Guilds Lake at the storage tank.

Plaintiff also objected to the conclusion of law requested by the plaintiff and subsequently signed by the Court to the effect that plaintiff was entitled to judgment against defendant in the amount claimed by plaintiff (Tr. 122) which objection was overruled and denied by the Court and the error was preserved by Assignment of Error XXXIV. The defendant also assigned as error the error of the Court in granting judgment in favor of plaintiff and against defendant in the amount allowed. (Tr. 133.)

SPECIFICATION OF ERRORS RELIED UPON BY APPELLANT

The appellant will rely in this court upon the following errors claimed to have been committed by the lower court:

I.

Error of the court in finding that plaintiff transported the shipments involved and delivered the same to the defendant at Guilds Lake in accordance with the bills of lading issued to cover said shipments, (Findings III, V, VII, Tr. 30, 31, 32, Assignments of Error XXIX XXX, XXXI, Tr. 132) and in refusing to find as requested by defendant that defendant performed a part of the transportation service in transporting said shipments from the interchange track to the oil spur also within Guilds Lake and the intended and known destination of said shipments. (Defendant's requested finding XII, Tr. 110, Exception, Tr. 114, Assignment of Error XIV, Tr. 129, Requested Conclusions III, IV, V and VI, Tr. 112-113, Exception, Tr. 114, Assignments of Error XXI, XXII, XXIII, XXIV, Tr. 130-131).

II.

Error of the Court in refusing to rule on defendant's request for ruling on question of law No. I as to whether or not the bill of lading covering shipments of company material consigned to a consignee carrier is required to specify the particular track on which said

shipments are to be delivered where the junction point of the two lines and the track to which said shipments are to be delivered are both within the destination specified in the bill of lading and the originating carrier knows the intended destination of said shipments. (Tr. 104, Assignments of Error I, Tr. 126.) This requested ruling is set out in full on page 7 ante.

III.

Error of the court in refusing to rule on defendant's request for ruling on question of law No. II as to whether or not it was the duty of the initial carrier on receiving the shipment of company material to specify in the bill of lading the particular track on which said shipment was to be delivered where it had or secured proper instruction as to the track of delivery where the junction point of the two lines as well as the known delivery track were both within the destination specified in the bill of lading. (Tr. 105, Assignment of Error II, Tr. 127.) This requested ruling is set out at large at page 8 ante.

IV.

Error of the court in failing to make and find Conclusion of Law No. II requested by the defendant to the effect that it was the primary duty of the initial carrier in accepting a shipment to see that the bill of lading properly shows the destination or to secure information to make definite the actual destination of the shipments.

(Tr. 112, Exception, Tr. 114, Assignment of Error XX, Tr. 130.)

V.

Error of the Court in failing to hold that the plaintiff is estopped to claim any insufficiency in the designation of the destination shown in the bills of lading by reason of the fact that when demand was made by the defendant for a part of the transportation charge the refusal to pay the defendant a portion of said charge was made on the ground that to pay any portion thereof to the defendant would be an illegal rebate and no objection was made on the ground of any insufficiency of the bill of lading.

VI.

Error of the Court in refusing to give judgment in favor of the defendant and against the plaintiff as requested by defendant. (Tr. 115-116, Exception, Tr. 116, Assignments of Error XXVIII and XXXVI, Tr. 131, 133.)

VII.

Error of the Court in giving and signing judgment in favor of plaintiff and against the defendant. (Tr. 35, Assignment of Error No. XXXV, Tr. 133.)

In the trial of this case all of the evidence was presented, all of the requests for rulings on questions of law, for findings and conclusions and judgment were made

by defendant with a view of presenting and preserving the one fundamental question, to wit: as to whether or not the shipments involved in this case were destined to a point on the line of the defendant beyond the junction point of the two lines by reason of which the defendant participated as a common carrier in the transportation service and was thereby entitled to a portion of the transportation charge. In the foregoing part of this brief, under the heading, "Manner in Which Question Arises", the defendant has set out with transcript references the various requests, exceptions and assignments of error to preserve this question. The above specific specifications of error under this point raise the same question.

ARGUMENT

Proposition of Law I

A carrier to whom a shipment of company material is consigned may participate in the transportation and share in the transportation charge where the shipment originates on the line of one carrier and is destined to a point beyond the junction on the line of a receiving carrier to whom the shipment is consigned, and where divisions have been established the originating carrier is entitled only to its division of the through rate from point of origin to point of destination.

Tuckerton R. Co. v. Penn. R. R. Co., 52 I.C.C. 319.

Rates on Railroad Fuel and Other Coal, 36 I.C.C. 1.

Mississippi River & Bonne Terre R. Co. v. Director General, 55 I.C.C. 677.

Appellant will contend that the shipments in question were shipments from a point on the line of the S. P. & S. to a point beyond the junction of the lines of the two carriers here involved, that the carriers had entered into a joint tariff establishing a rate between the origin point and the destination point, that the appellant performed a part of the transportation service and was entitled to receive as transportation charge one-half of the through rate from point of origin to point of destination.

There is little difference between the parties hereto on the question of fact. This case on the main point involved depends primarily upon the application of the law. The appellee does not question the principle of law above cited but claims the transportation service terminated at the interchange point between the two lines and not at the oil tank of the appellant in Guilds Lake. It concedes that if the bill of lading had designated the oil spur in Guilds Lake as the destination instead of simply Guilds Lake the Terminal Company would have been entitled to participate and received one-half the transportation charge.

The shipments in question all originated at either the plant of the Standard Oil Company located on the S. P. & S. line about a mile north of the interchange track at Guilds Lake, the particular district being known as Willbridge, or at the plant of the Richfield Oil Company at the district known as Linnton on the line of the S. P. & S. about four miles north of the interchange track at Guilds Lake. (Tr. p. 38.) All of the shipments involved up to and including January 4, 1930, originated at the Standard Oil plant. The Terminal Company had by contract purchased from the Standard Oil Company its supply of fuel oil for its engines, the contract providing that the oil should be delivered to the Terminal Company f. o. b. fuel oil spur Guilds Lake Portland. (Stipulation, Tr. 96.) The oil purchased from the Richfield Oil Company constituting all of the shipments moving subsequent to January 4, 1930, were purchased by the Terminal Company f. o. b. Richfield oil plant at Linnton. From the

inception of these shipments until the end there was a total of 3076 cars moved, making an average of almost a car of oil a day.

All of the rail carriers in the City of Portland had joined in and filed both with the Interstate Commerce Commission and with the Public Service Commission of Oregon a tariff providing switching rates from all originating points within what is known as the Portland switching district to all other points within said district. This tariff cut the Portland district up into seven zones, and established rates for movements within a single zone or from one zone to another, the rate varying as to the number of zones through which a particular shipment moved. (Tr. 38 et. seq.) Zone No. 5 in the tariff is the only zone involved in the shipments here involved for both the originating point, the entire movement and the destination point were within Zone 5. The switching rate provided by the tariff for movement from one point to another in the same zone at all times was $8.55 per car, with the exception of a short period when the rate was increased to $9.20 per car. There is no dispute between the parties as to the measure of rate at any time but only as to the right of the Terminal Company to a division thereof. The agreement between the parties to the switching tariff provided that the switching charge should be divided equally between the carriers participating in the switching service. If there were three carriers participating in the service the charge was divided equally three ways. If there were but two as claimed by the appellant in this case the rate would be divided equally between them. Zone

5 with a few exceptions not material to this case was described in the tariff as all tracks on the west side of the Willamette River north of Nicolai Street to the north boundary of Linnton, and there is no dispute between the parties that the originating point, the interchange track and the oil storage tank of the Terminal Company at Guilds Lake were all within this zone. Within the zone the rates were blanketed, that is, the rate was the same from any originating point within the zone to any destination point within the zone so that whether the destination of these shipments was the interchange track at Guilds Lake or the oil spur track at Guilds Lake the rate would be the same.

Guilds Lake is a tract of land consisting of a break-up and make-up yard, roundhouse where the engines are hostled, oil storage tank, passenger coach cleaning yard, supply warehouse, and repair shop. All of Zone 5 is within the Portland switching district. The main line of the S. P. & S. within this district starts at what is denominated in the tariff the North boundary of Linnton. This main line proceeds in a southerly direction paralleling the river, passing in order southerly the oil plants at which the shipments originated, Guilds Lake and thenceforth south into the main yards and facilities of the S. P. & S. at Portland. Paralleling the main line of the S. P. & S. is the make-up and break-up yard at Guilds Lake. This yard extends alongside the main track of the S. P. & S. for a distance of about three-quarters of a mile. The roundhouse, however, at which the oil storage tank of the Terminal Company is located is not adjacent to this

make-up and break-up yard but to reach it requires a movement of one-half or three quarters of a mile whereby locomotives and cars are required to move south onto the main lead to the make-up and break-up yard and switch back into the roundhouse and oil storage tank track. However, all of the development of the Terminal Company, including the make-up and break-up yard, the roundhouse, oil storage tank, the supply warehouse, coach cleaning yard, and repair shop are all within what is known and designated as Guilds Lake.

In the interchange of business between the S. P. & S. and the Terminal Company the receiving line designates to the other line the track known as the interchange track on which the carrier transferring cars to the other shall place the cars to be transferred. The carrier therefore on any business to be transferred to the other places the cars upon the interchange track designated by the receiving carrier and the receiving carrier picks them up and transports them to the destination on its line or transports them to some connection with another carrier for further transportation. In this interchange between the carriers the Terminal Company designated to the S. P. & S. as the interchange track a track in the make-up and break-up yard at Guilds Lake. The S. P. & S. in this interchange designated as its interchange track a track at the Admiral Dock one and one-half miles further south. It so happened therefore that the interchange track designated by the Terminal Company on which it would receive interchange shipments was within the territory known as Guilds Lake. The Terminal Company could

have designated any other track at which there was a junction of the two lines upon which it would receive shipments and in the event of such designation the S. P. & S. in making interchanges would have had to take the cars in question to the track so designated and the Terminal Company would have picked them up and taken them to the oil storage tank in Guilds Lake. Had such track outside of Guilds Lake been designated by the Terminal Company as the interchange track there would be no question between the parties hereto as to the right of the Terminal Company to receive one-half the switching charges in question, even with the bills of lading reading as they did, for in that event the S. P. & S. concedes the Terminal Company would have performed a transportation service on the shipments. (Tr., bottom of p. 59.)

In making the shipments in question the S. P. & S. picked up the cars at the Standard Oil Plant at Willbridge and issued its bill of lading to the Standard Oil Company, attached the cars to its trains and placed them, together with other cars to be interchanged to the Terminal Company, on the interchange track at make-up and break-up yard at Guilds Lake. In order to get these cars on the oil track at Guilds Lake the Terminal Company was compelled to switch them out of the general interchange and transport them from the make-up and break-up yard out on the main lead and back into the storage track, as heretofore designated, a distance in the neighborhood of three-quarters of a mile. (Tr. 85, 89.)

The freight, as far as the Standard Oil Company was concerned, was all prepaid by that company to the S. P. & S. The S. P. & S. refused to account and pay to the Terminal Company one-half of this charge, not on the ground as is now contended by the S. P. & S., but on the ground that inasmuch as the shipments were consigned to the Terminal Company to permit the Terminal Company to participate in the revenue would be a form of rebating which would be unlawful.

On August 18, 1926, E. L. Brown, then Comptroller of the Terminal Company, addressed a letter to H. Sheedy, agent of the S. P. & S., as follows: (Tr. 60)

"August 18, 1926.

Mr. H. Sheedy, Agent,
Spokane, Portland & Seattle Railway Co.
Portland, Oregon.

Dear Sir:

Upon investigation of cars delivered by S. P. & S. Ry. to Nor. Pac. Terminal Company of fuel oil, billed to N. P. T. Co., we find all the revenue is absorbed by the S. P. & S. Ry. We think this practice is wrong as under the switching tariff the Nor. Pac. Terminal Co. should get 50% of this revenue.

We have had this matter up with our General Yardmaster and he reports as follows:

'S. P. & S. merely deliver to us in transfer at Lake Yard loaded. We set cars to roundhouse and heating plants for unloading. When cars are empty we return to S. P. & S. (Deliver them into their Yard).' [62]

It is manifestly evident that the Terminal Company performs a part of the switching after re-

ceiving the cars from you, also in delivering the empty cars back to your yard. Under the arrangement of the zone switching tariff, we are entitled to 50% of the revenue where two companies participate in the switching.

Please acknowledge receipt.

Yours truly,

E. L. BROWN."

The letter of Mr. Pickard, General Freight Agent of the S. P. & S. in reply to the above reads as follows: (Tr. p. 61)

"Portland, Oregon, August 26, 1926.

Mr. E. L. Brown, Comptr.,
Northern Pacific Terminal Co.
Portland, Oregon.

Dear Sir:

Your letter August 18th, file C-141, addressed to Mr. H. Sheedy, has been referred to this office.

Inasmuch as these cars are consigned to the Terminal Company, insofar as the S. P. & S. is concerned, when they are set by us on the interchange with your line we are no longer interested in what is done with them. Delivery has been made to the Terminal Company at the nearest point and to give you a refund through the subterfuge of permitting you to participate in the division by reason of your switching it from the interchange over to the roundhouse, it seems to me would be nothing more or less than a modified form of rebating, in view of the oft expressed opinion of the Interstate Commerce Commission that a carrier performing service for another carrier, as we are doing for you in this instance, must make the same

charge against such other carrier as they would contemporaneously make against any other shipper or consignee.

Your truly,

R. W. PICKARD,
General Freight Agent." [63]

The witness Pickard testified as to what the designation "Guilds Lake" covered as follows: (Tr. p. 62)

"Guilds Lake covers not only the make up and break up yard but also the roundhouse and other facilities at that point; they have a place for car storage and cleaning, and I imagine have a large supply warehouse there where they keep general supplies for their equipment, and I am sure that they have car repairers down there making repairs on the cars. Guilds Lake covers not only this so called make up and break up yard but it covers all of the tracks and facilities there. It is called the Guilds Lake terminal. What the designation on a bill of lading 'Guilds Lake' might mean from the standpoint of the shipper is questionable."

There was no question in the railroad agent's mind as to what was covered thereby.

It will be noted that there is no reference in the above quoted letter of the General Freight Agent of the S. P. & S. to any insufficiency of the billing of the cars. The ground upon which he places his refusal is that inasmuch as the shipments were consigned to the Terminal Company, and inasmuch as the S. P. & S. had placed them on the interchange track, the nearest point, notwithstanding the Terminal Company transported them to the oil track, the S. P. & S. could not

permit the Terminal Company to participate in the rate as it would be an unlawful rebate. An examination of the authorities cited above will demonstrate how incorrect the General Freight Agent of the S. P. & S. was in this position, for the law is firmly established that where a carrier to whom company material is consigned beyond the point of interchange, the receiving carrier may participate in the transportation charge and the forwarding line is entitled only to its division of the rate up to the point of interchange. But the General Freight Agent of the S. P. & S. was corrected in his idea of the law very shortly after his letter, quoted above, by his own counsel for a similar situation arose in connection with fuel oil delivered to one of the other carriers parties to the switching tariff, to wit: the Portland Electric Power Company. Instead, however, of declining the request of the Portland Electric Power Company on the ground that it would be rebating the General Freight Agent submitted the question to Carey & Kerr, by letter dated November 24, 1926, found on page 76 of the transcript, as follows:

"November 24, 1926.

Messrs. Carey & Kerr, Attys.
Yeon Building,
Portland, Oregon.

Dear Sir:—

There is attached a copy of Henry's tariff No. 6-C which names switching rates between points in the Portland Switching Terminals:

We have oil storage tanks located in what is known as the Linnton and Willbridge district, said

district being included in Zone 5 as described in item 70 of the tariff.

The P. E. P. Co. is a user of fuel oil and their storage tanks are located in East Portland north of East Mill Street known in the same item of the tariff as Zone 8.

In item 75 of the tariff it will be noted there is a rate provided on traffic between Zone 5 and 8 of $16.50 per car. The divisions governing the rates as agreed upon between the various lines are that they will divide equally as between the number of lines handling. A copy of the division sheet is also attached.

There are shipments of fuel oil moving from Linnton and Willbridge in Zone 5 to the P. E. P. Co. in Zone 8. This fuel oil, however, is interchanged to the P. E. P. at our interchange track which is located in zone two and the switching rates from Zone 5 to 2 is $14.00 per car. It has been our contention that on company fuel oil for the P. E. P. when we deliver the car to that line at our interchange with them in Zone 2 the movement is complete because the shipment is given to them. They on the other hand contend that the shipment has not reached its destination until it is finally spotted at their storage warehouse in Zone 8. If our contention is correct we would take the entire amount of Zone 5 to Zone 2 of $14.00 per car. If, on the other hand, the P. E. P. Co.'s contention is correct; that is, that the shipment is subject to Zone 5 to Zone 8 rate and they out of that, for their handling from our interchange track to their storage warehouse, get 50% as per the division sheet then the rate and divisions would be as follows: Zone 5 to zone 8 $16.50 of which the P. E. P. Co. would be entitled to $8.25, or 50%.

They contend under the Commission's Conference Ruling No. 225 that the rate to be charged

against them is the rate we would charge to John Jones, for example, and while that is true it seems to me that our reimbursing them with 50% of the revenue would not result in them paying as much freight charges as John Jones for the reason that they would, through the medium of the division sheet, get 50% of it back.

Again there is a grave question as to whether under Conference Ruling 225 they are not entitled to have the shipment billed from zone 5 to their warehouse in zone 8, even though it is their own traffic, and particpate in the division where that would give them a net transportion cost less than the zone 5 to zone 2 rate of which we keep all.

I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil from Willbridge to S. P. Brooklyn storage tanks located in zone 4 and *from Willbridge to the N. P. Terminal storage tanks in Guilds Lake which is within the same zone;* namely, 2 and whatever the ruling is in connection with the P. E. P. situation will likewise apply to the other traffic.

Briefly summed up it seems to be a question of whether or not the other companies at Portland are entitled to a divisional cut out of the switching revenue accruing on their own fuel oil.

Yours truly,

R. W. PICKARD,

EB:FH General Freight Agent."

(Italics ours)

It will be noted in this letter, in submitting the question that he refers to the fact that he had been contending that the delivery was completed when they put the car on the *interchange track.* They have now gone

back to this same contention. The Court will note also that in writing this letter the General Freight Agent refers to the fact that similar movements are being made to the Terminal Company at Guilds Lake, and he desired the ruling to apply in all cases. The ruling of the attorneys will be found on page 79 of the transcript, as follows:

"Portland, Oregon,
November 30, 1926.

Mr. R. W. Pickard, General Freight Agent,
Spokane, Portland and Seattle Railway
Company,
Portland, Oregon.

We have your letter of the 24th instant enclosing copies of tariff stating Portland switching rates, which copies we return herewith.

It seems to us that the Portland Electric Power Company is right in this dispute and that the situation can be corrected only by a different arrangement for divisions. The tap line division cases established the right of an industry to own a common carrier line which, if it was in truth a common carrier line, could legally share in the through rate. The Portland Company is in much the same situation as one of the these industries owning a tap line. It can have its shipments consigned to their actual destination and participate in the division of the freight charge.

Ordinarily it is to the interest of a carrier which is also the consignee of a shipment, to fix the first junction point with the connecting carrier as the bill of lading destination so as to avoid the imposition of commercial freight rates for the full haul. In this case the advantage is the other way

but we see no way of compelling the Portland Company to bill the shipment to the point of connection instead of its actual destination.

CAH:GK
Enclosures CAREY & KERR."

However, the General Freight Agent, although he obtained this ruling for the purpose of guiding him not only with reference to the Portland Electric Power Company, but also with reference to these oil shipments going to the Terminal Company, did nothing with reference to correcting his former position with the Terminal Company that to pay to the Terminal Company a part of the rate would be rebating. Notwithstanding he had been corrected by his counsel he continued to take all of the revenue from the shipments to the Terminal Company, and notwithstanding the fact that he had been informed by the Terminal Company but two months before that the interchange track at Guilds Lake was not the destination of the shipment, and that the Terminal Company was performing a transportation service in transporting them from the interchange track over to the oil tank.

Again, however, the Comptroller of the Terminal Company, on March 20, 1930 (Tr. 98), called attention to the fact that the fuel oil was being transported to the Terminal Company plant where it was unloaded, and that the rate should be $8.55 divided equally. This letter is as follows:

"Portland, Oregon, March 20, 1930.

Mr. S. F. Parr, Agt.,
S. P. & S. Ry. Co.,
Linnton, Oregon.

Dear Sir:

Wish to call your attention to the fact that you have been billing the Northern Pacific Terminal Co. in the amount of $11.50 per car on fuel oil, the rate applicable on cars moving from Zone 5 to Zone 1.

This rate is incorrect. The N. P. Terminal Co. plant, where this fuel oil is unloaded, is located at Guilds Lake Yard in Zone 5 and the rate of $8.55, applicable to an exclusive Zone 5 switch movement should be charged, with an equal division of the revenue between the N. P. T. Co. and the S. P. & S. Ry. Co.

Will you please acknowledge receipt of this letter and advise when an adjustment will be made on the freight bills which we have paid to the S. P. & S. at Linnton, where the incorrect rate was applied? Your asumption that our Guild's Lake plant was located in Zone 1 is incorrect. It is located in Zone 5.

Yours truly,

(Sgd) C. B. Shibell,

Comptroller."

This time the Comptroller of the S. P. & S., Mr. Crosbie, replied, but still insisted that the Terminal Company was not participating in the haul. His letter is dated March 29, 1930, and is as follows: (Tr. 99)

"March 29, 1930.

Mr. C. B. Shibell, Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon.

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL COMPANY

Referring to your letter of March 20th, file C 201, to agent at Linnton, in regard to charges billed you on shipments of your fuel oil to Portland where you have been billed a Zone 5 to Zone 1 charge of $11.50 per car instead of the Zone 5 rate of $8.55; [91]

It is our understanding that these shipments are billed to connection with your line at Guild's Lake and should be handled on S. P. & S. local switching settlement statements, your line not participating in the haul. Charges should, therefore, be adjusted to $8.55 per car which amount should accrue to the S. P. & S. As settlement has been made allowing your line $5.75 per car out of the revenue, adjustment should now be made reducing the charges to $8.55 per car which amount would accrue to the S. P. & S. making a balance in favor of the S. P. & S. of $2.80 per car.

Please advise if you will accept our bill for adjustment on this basis or do you prefer to handle thru agents account. We believe that adjustment could be expedited, with the lease inconvenience to all concerned, if handled thru audit bill instead of thru the agents' account.

(Sgd) Robt. Crosbie,
Comptroller."

Immediately, on April 1, 1930, the Comptroller of the Terminal Company, addressed the Comptroller of the S. P. & S., in his effort to correct this situation, as follows: (Tr. 100)

"April 1, 1930.

Mr. Robert Crosbie, Comptroller,
Spokane, Portland & Seattle Railway Co.,
Portland, Oregon.

Dear Sir:

I have your letter dated March 29, 1930, file TR 382-N, relative to accounting for revenue assessed under the Zone Tariff, on fuel oil moving from Linnton to the Northern Pacific Terminal Company.

These cars of oil are billed to the Northern Pacific Terminal Company at a rate of $8.55 per car, which covers the placement of the load at the industry, and not only to a connecting line, as stated in your letter. Terminal Company power completes the delivery from setout track to the industry, which in this instance, is the Northern Pacific Terminal Company, fuel track, and the $8.55 in the published tariff is not earned until placement on our fuel track is made. In accordance with published tariff, the $8.55 should be divided between the carriers participating in the haul, and therefore, you should report to us 50% of the $8.55 as the line completing the delivery.

Yours truly,

Original signed by C. B. Shibell,
Comptroller.

Cc—John Miesbus,
General Yardmaster
Dict. CSB:JH [92]"

To this final appeal the Comptroller of the S. P. & S. acceded as shown by his letter of April 18, 1930, as follows: (Tr. 101)

"April 18, 1930.

Mr. C. B. Shibell, Comptroller,
The Northern Pacific Terminal Company,
Portland, Oregon.

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL CO.

Replying to your letter of April 1st, File C 141, in regard to division of switching revenue on shipments of fuel oil consigned to the Northern Pacific Terminal Company:

If delivery of oil shipments to connections with your track does not complete the movement and the movement from such connections to unloading points involves an additional haul by the Northern Pacific Terminal Company, you will be entitled to 50% of the switching charge.

You have been charged $11.50 on a number of these shipments out of which your line has received $5.75 whereas the correct charges are $8.55 out of which your line received $4.28. This leaves an overcharge of $2.95 per car of which $1.47 is due from your line, leaving a net amount due of $1.47 per car.

Please advise if you will render audit bill against us to adjust these items or do you prefer to have it handled thru the Agent's accounts by corrections on the switching settlement statements.

Yours truly,

ROBT. CROSBIE.

HS J"

Apparently, however, the correction was not made for all of the shipments which had moved and on April 1, 1932, the Comptroller of the Terminal Company, again called the attention of the Comptroller of the S. P. & S. to the matter by letter of April 1, 1932, as follows: (Tr. 71)

"April 1st, 1932.

Mr. Robert Crosbie, Comptroller,
Spokane, Portland and Seattle Railway Co.
Portland, Oregon.

Dear Sir:

Please be referred to your letter dated April 18, 1930, file TR 382-N, relative to switching charges on fuel oil consigned to Northern Pacific Terminal Company.

Corrections of the switching charges as reported by your agent at Linnton, Oregon, on statements issued to January 1, 1930, were made on statements No. 8, 19, 20, 21 and 22, to the Northern Pacific Terminal Company, April, 1930 accounts, and refund of the overcharge in the switching rate was made to the Northern Pacific Terminal Company through our Bill Collectible No. 14687, May 1930 accounts.

Since this time a check was made of all freight settlements, which developed that switching charges were not corrected on switching settlement statements, of all fuel oil for the Northern Pacific Terminal Company moving from the Standard Oil Company's plant at Willbridge, Oregon, to the Northern Pacific Terminal Company's set out track at Guilds Lake, period February 1st, 1923, to December 31st, 1929. This would involve a reporting to the Northern Pacific Terminal Com-

pany of one-half of the zone rate of $8.55 per car, covering movement during that period.

Please advise if you will prepare settlement statement reporting this revenue to the Northern Pacific Terminal Company, or if it will be necessary for us to prepare a Bill Collectible versus the Spokane, Portland and Seattle Railway Company to recover our proportion of these switching charges.

Yours truly,

C. B. SHIBELL."

The Comptroller of the S. P. & S. then invoked the statute of limitations on the shipments by his letter of April 25, 1932, as follows: (Tr. 73)

"Portland, Oregon, File No. TR 382-N

April 25, 1932.

Mr. C. B. Shibell,
Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon.

Switching Charges on Fuel Oil for Northern Pacific Terminal Company

Dear Sir:

Referring to your letter of April 1st, 1932, file 141V7 relative to adjustment of switching settlement statements in connection with fuel oil moving from Standard Oil Company's plant at Willbridge to the Northern Pacific Terminal Co. at Guilds Lake:

The statute of limitations on adjustment of state traffic is six years, all records previous to that time being destroyed, and this will be your

authority to render bill against the SP&S for your proportion of switching charges on all cars moving April, 1926, and subsequent thereof.

Yours truly,

ROBT. CROSBIE—EJB."

In this letter the Comptroller authorized settlement for a period of six years and authorized the delivery of a bill against the S. P. & S. for all cars moving April, 1926, and subsequent thereto. Later, however, the S. P. & S. attempted to invoke a shorter period of three years established by the Railroad Accounting Officers' Association and the S. P. & S. settled only for a period of three years. (Tr. 74-5.) However, the Terminal Company was not a member of the Railroad Accounting Officers' Association, had not subscribed to its rules and was not bound thereby. The witness Johnsrud claimed that because the Terminal Company stock was owned by the Oregon-Washington Railroad & Navigation Company, Northern Pacific Railway Company, and Southern Pacific Company, who were members of such association, that this limitation was binding on the Terminal Company. However, that hardly needs argument to refute. Certainly because a stockholder has subscribed to a certain agreement would not bind the company in which he owns stock.

The S. P. & S. did, however, collect and pay to the Terminal Company its proportion of the switching charges for a period of three years and this is part of the money sought to be recovered by the S. P. & S. in

this case and which the Court permitted the S. P. & S. to recover.

In none of this correspondence between the parties hereto was any contention made by the S. P. & S. that there was anything wrong with the manner in which the shipments had been billed. There is no intimation in the pleadings in this case that there was anything wrong in the billing. It was not until the testimony was taken that such contention was made.

As heretofore pointed out, both the interchange track and the track serving the oil storage tank are in Guilds Lake and being tracks north of Nicolai Street the rate was the same to each point. The S. P. & S. had joined in the tariff by which it published the fact that it, together with the Terminal Company, would transport shipments to either point at the rate of $8.55 per car. The contention is made that the Terminal Company should have seen that the destination as shown in the bill of lading was made to a particular track in the Guilds Lake. The Terminal Company, however, was not a party to the bill of lading. The bill of lading was that of the S. P. & S. The undertaking of the Standard Oil Company with the Terminal Company was that it would deliver the oil f. o. b. oil spur Guilds Lake. When the shipments were received by the S. P. & S. it issued its bill of lading to the Standard Oil Company. The Terminal Compay, as far as the record shows, and we believe in fact never saw any one of the bills of lading so issued by the S. P. & S. It knew that the rate applied not only to the interchange track but to the oil spur and all other tracks in Guilds Lake.

It could not make delivery on any track in the Guilds Lake district. It had no right to go into Guilds Lake for any purpose except to make an interchange with the Terminal Company for its further transportation, and that was by reason of the fact that the Terminal Company had designated a track in the make-up and break-up yard as the interchange track. If there was any doubt in the minds of the officers or agents of the S. P. & S. as to the exact track in Guilds Lake where the shipments were to be delivered it should have secured definite information on that point before accepting the delivery. The correspondence above quoted repeatedly told the S. P. & S. that the interchange track was not the destination and that the Terminal Company was performing additional service in transporting their cars to the oil spur. It knew that for the rate named it was obligated under the tariff to transport said shipments for delivery at any track within the Guilds Lake district. It did in fact have definite information and the bills of lading designated in the routing shown that the Terminal Company was to perform part of the transportation service. There was presented to the General Freight Agent Pickard of the S. P. & S. a copy of a bill of lading admittedly copy of one of the bills of lading on shipments involved in this case which read: "Consigned to The Northern Pacific Terminal Company, Guilds Lake, Portland, State of Oregon, Route S. P. & S.-N.P.T."

It was admitted that the initials "N. P. T." in the routing would normally designate that the Terminal Company was to participate in the transportation (Tr.

48) but the General Freight Agent maintained that in view of the fact that the destination was indicated as Guilds Lake the initials meant nothing to him. It should, however, have meant something to him because the same rate by the tariff entered into by the S. P. & S. applied to all tracks in Guilds Lake and none of them could be reached for delivery except through the transportation service of the Terminal Company. Therefore, with such designation upon the bill of lading, if there was any doubt in the agent's mind as to where the shipments were going and the bill of lading required a definite track to be designated he should have required the additional information and inserted it, as indicated by his testimony (Tr. 49) where he testified that if a shipment were consigned billed to the Southern Pacific, Portland, Oregon, with routing designated in the bill of lading S. P. & S.-NPT, if he were the agent he would not accept the shipment, but would ask for some point of delivery to be designated on the bill of lading.

In view of the fact that numerous tracks in Guilds Lake to all of which shipments could be made at the same rate if there was any doubt in the agent's mind, or if the S. P. & S. were unwilling to participate in shipments beyond the interchange point, where the routing showed that the NPT Co. was to be one of the participating carriers, then it was the duty according to the General Freight Agent's testimony to reject the shipment or seek further information as to the exact track to which delivery was to be made.

It is rather peculiar that with the tariff provisions as they are that the carrier issuing the bill of lading should have the right to say that the transportation should not extend beyond the interchange point.

But the S. P. & S. was left in no doubt certainly after August 18, 1926 when it received the letter (Tr. 60) that the shipments were not destined to the interchange track. These shipments were moving practically daily. After this knowledge they should, if they deemed it so essential, have corrected their bills of lading to conform with the information given them in that letter. They were so informed in fact as shown by the letter of November 24, 1926 to the S. P. & S. counsel asking information as to the rights of the S. P. & S. in the premises. The language in that letter leaves no doubt as to the knowledge of the S. P. & S. as to where these shipments were destined for it says (Tr. 78) "I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil * * * from Willbridge *to the N. P. terminal storage tracks in Guilds Lake which is within the same zone.*"

The General Freight Agent did not say simply to Guilds Lake or the interchange track but particularized that the shipments were going to the *storage tracks* in Guilds Lake. Therefore, with this specific knowledge as shown in this letter, if it were so material to designate the particular track the General Freight Agent of the Company to whom the matter had been referred should have seen that his agents who issued the bills of lading inserted the particular track. The bills of lading were the bills of that company, not of the

Terminal Company. The Terminal Company had nothing to do with the billing. With this knowledge in the possession of the General Freight Agent of the S. P. & S. it is hard to see why the Terminal Company should be penalized to the extent of some twelve or thirteen thousand dollars for the failure of the General Freight Agent to see that his station agent properly billed the shipments, on which that company made the contract of carriage.

We submit that the bills of lading were sufficient to require delivery at any point in Guilds Lake. The General Freight Agent of the S. P. & S. admitted that if the interchange point were outside of Guilds Lake the billing would be sufficient to permit the Terminal Company to participate in the revenue. (Tr. 59) Furthermore, the billing is sufficient to permit and require delivery at any point in Guilds Lake and the S. P. & S. should not have the right to say it should terminate short of any track in Guilds Lake under such billing. In billing shipments a particular track is ordinarily not designated and upon arriving inquiry is made of the consignee at what point he wants delivery. (Tr. 88-89) Counsel for the S. P. & S. in the lower court conceded that a shipment so billed to any other consignee except a carrier would be sufficient and would require delivery at any point in Guilds Lake, whether billed to a particular track or not. (Tr. 81 et seq.)

The fact that a carrier is the consignee should certainly not make any such distinction, especially in view of the knowledge on the part of all concerned as to the actual destination of the shipments, and that that des-

tination was within the term Guilds Lake as shown on the bill of lading.

It is significant that the shipments with reference to which the concession of counsel was made were shipments of fuel oil for company use from one of the oil companies at Linnton consigned simply to the "Northern Pacific Railway Company at Portland, Oregon, *no particular track being designated*" and inquiry was being made by the comptroller of the S. P. & S. as to the fact that they were being unloaded at Guilds Lake for the purpose of determining the rate applicable. Here were shipments of company material consigned to a carrier in which a particular track was not required to be designated in the billing. In fact simply the general designation of Portland was designated as the destination, (Tr. 81-2) and that the shipment was delivered at Guilds Lake and the Terminal Company participated in the revenue (Tr. p. 82).

Notwithstanding this knowledge on the part of the officers of the Company the matter was again called to the attention of the Comptroller of the S. P. & S. on March 20, 1930 and a number of letters interchanged between the officers of the two companies which were heretofore quoted. (Tr. 98-102). Yet with this additional correspondence and particular calling of the matter to the attention of the officers of the S. P. & S., the S. P. & S. the line issuing the bill of lading took no steps to change the billing to satisfy what it now maintains was necessary when it had within its power all of the information necessary to satisfy its contention and nowhere

claimed any responsibility on the part of the Terminal Company for changing said billing. After the letter of March 20, 1930 again insisting upon this right to participate, and again notifying the officers of the actual destination of the shipments, and especially after the concession of the S. P. & S. of the right of the Terminal Company to participate (letter of Crosbie, April 18, 1930), it is claimed and the court has permitted recovery for all shipments from March 20, 1930 up to March 28, 1932. Certainly if there was any duty on the part of anyone to see that the destination in the bills of lading was satisfactory to it that duty rested upon the carrier issuing the bills of lading and the Terminal Company should not be charged with any neglect or failure in this regard and this duty certainly obtained at all times from and after the letter of August 18, 1926 and especially after the knowledge of the actual destination of the shipments shown in the letter of Mr. Pickard to the S. P. & S. counsel in November, 1926. There was no difference in the character of the daily movement of these shipments from the beginning to the end, and full knowledge of the character thereof was in the possession of the S. P. & S.

Proposition of Law II

The essential nature of the shipment determines the character thereof and the mere insufficiency or incorrectness of billing does not affect the same. The Court will look to the essential character of the shipment intended by the party, irrespective of the billing.

Baltimore & Ohio S. W. v. Settle, 260 U. S. 166, 43 Sup. Ct. 28.

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346.

Ill. Cent. R. Co. v. De Fuentes, 136 U. S. 157.

Tuckerton R. Co. v. Penn. R. R. Co., 52 I C. C. 319.

Rates on Railroad Fuel and Other Coal, 36 I. C. C. 1.

We will contend under this proposition that at all times during the shipment in question, and especially since August 18, 1926, all parties intended and all parties knew that the shipments were destined to the oil storage tank of the appellant at Guilds Lake, and that that was the essential character of the shipments which should govern irrespective of the billing.

In the case of Baltimore & Ohio S. W. v. Settle, 260 U. S. 166, 43 S. Ct. 28, the United States Supreme Court had before it a case in which lumber was shipped interstate billed to the station of Oakley. Both the station of Oakley and Madisonville were within the city limits of Cincinnati, but the rates on lumber from southern points to Oakley plus the local intrastate rate from Oakley to Madisonville were less than the through interstate rate from southern points to Madisonville. The shipment in question was therefore billed to Oakley and possession taken at Oakley. Later a new billing and shipment was made from Oakley to Madisonville. The purpose, of course, was to get the benefit of the lower rate, but the Supreme Court held in substance that it was the intention of the shipper at all times to transport said shipment to Madisonville and that the

essential character of the shipment was therefore one from originating point to Madisonville, notwithstanding the original billing of same to Oakley. In the course of the opinion, the court quoting from 43 Sup. Ct. 30, says:

> "And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. (Citing numerous authorities.)
>
> "If the intention with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley, and that they were not rebilled for several days, would have justified the jury in finding that it was originally the intention to end the movement at Oakley, and that the rebilling to Madisonville was an afterthought. But the defendant Clephane admitted at the trial that it was intended from the beginning that the cars should go to Madisonville, and this fact was assumed in the instructions complained of. * * * Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement, and hence that the movement through to Madisonville was an interstate shipment; for neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. These are common incidents of a through shipment, and when the intention with which a shipment was made is in issue the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been

intended, these incidents are without legal significance as bearing on the character of the traffic."

As stated by the court this principle is established by a long line of authorities and is thoroughly shown by the other authorities cited above.

This same principle we submit is applicable here. Counsel lays too much stress upon the billing; the destination point of these shipments was Guilds Lake and the particular track is that at the oil storage tank and it was always intended by all parties that that was its destination and in fact all of the oil was so moved.

The oil was purchased for delivery at the fuel oil spur in Guilds Lake. We have developed fully and referred under the prior point to the fact that the S. P. & S. was fully advised of this fact, certainly from and after August 18, 1926. We maintain that there was no incorrect billing as the point of delivery was within Guilds Lake and if it required any more specific designation and destination in the bills of lading it was the duty of the S. P. & S., the carrier who issued the bill of lading, to properly bill it as it had at all times since August 18, 1926, full knowledge of where said shipments were moving and intended to move. The essential character of the shipments was from start to finish to this point in Guilds Lake, that it required the services of the Terminal Company in reaching that point, and under the law the Terminal Company was entitled to its share of the switching charge for such movement.

In order to justify the S. P. & S. in its claim that the shipments were completed at the interchange track,

why was not it its duty to particularize that track as the destination, if a definite track was required to be specified as now claimed by it? The oil spur, and any other track in Guilds Lake would fit the destination named in the bill of lading as fully as the interchange track insisted upon by the S. P. & S. as the destination. Why did it have the right to insist upon naming the point of destination within Guilds Lake, especially in view of the fact that during said shipments it was repeatedly informed that the interchange track was not the destination but the oil track was the destination and the intended destination of all such shipments—and it by its published tariffs had undertaken to transport by itself and connections all shipments tendered to that intended destination and had received the tariff charges for transportation to that destination?

Proposition of Law III

Estoppel

Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his ground and put his conduct upon a different basis. He is estopped from so doing.

Railway Co. v. McCarty, 96 U. S. 258, 267.
Davis v. Wakelee, 156 U. S. 689.
Oakland Sugar Mills v. Wolf Co. (C.C.A.) 118 Fed. 248.
Smith v. Boston Elevated R. Co., 184 Fed. 389.
Davis and Rankin Bldg. & Mfg. Co. v. Dix, 64 Fed. 406, 410, 411.

Lorane Mfg. Co. v. Oshinsky, 182 Fed. 407.
Southern Cotton Oil Co. v. Shelton, 220 Fed. 256.
Polson Logging Co. v. Neumeyer, 229 Fed. 707.

We have, without requoting the correspondence written by the parties hereto to each other, pointed out the fact that the S. P. & S. by its General Freight Agent by letter to the Comptroller of the Terminal Company dated August 26, 1926 (Tr. 61) declined to permit the Terminal Company to participate in the carrying charges on the ground that to do so would be a form of rebating and therefore illegal, that he had never withdrawn this basis of objection and that later the Comptroller had in fact on assurance of the Terminal Company that the shipments had actually moved to the oil track in Guilds Lake, permitted the Terminal Company for a period at the end of said shipments to participate in the revenues and had paid certain sums to the Terminal Company on that account but never during the entire controversy had the S. P. & S. placed its refusal upon any claimed insufficiency of the bill of lading. It had indeed placed its objection on other grounds. Under such circumstances the courts have held the party having taken a certain position in relation to a controversy before litigation starts cannot change the basis of such claim when litigation has started. Therefore, under this principle plaintiff should have been compelled to recover on the basis that to permit the Terminal Company to participate in the charges would amount to a rebating and therefore illegal. Having made no objection during the controversy on any

other ground, and especially having made no objection on the basis of insufficient billing, especially in view of the fact that such billing was its own duty, it should be estopped now to change the basis of its objection and recover on the ground that the billing required a specific track in Guilds Lake to be designated as the destination.

Railway Co. v. McCarthy, 96 U. S. 258, was an action for recovery of damages for injury to shipment of livestock. One of the grounds was delay in shipment. On arrival of the shipment at a certain station for further transportation over the line of another carrier the cars for said shipment were not ready and the ground for such delay was at the time given on account of lack of cars to transport the cattle. When the case was brought the carrier took the position that the day on which cattle should have been shipped was Sunday and that the Sunday law prevented such shipment on that day. With reference to this question the Court, at page 267, says:

> "The question made by the company upon the Sunday law of West Virginia does not, in our view, arise in this case. We have already shown that the defendant proved upon the trial that it was impossible to forward the cattle on Sunday, for want of cars. And it is fairly to be presumed that no other reason was given for the refusal at that time. It does not appear that any thing was then said as to the illegality of such a shipment on the Sabbath. This point was an after-thought, suggested by the pressure and exigencies of the case.
>
> "Where a party gives a reason for his conduct and decision touching any thing involved in a con-

> troversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (Citing decisions.)

So in the present case the S. P. & S. at no time placed its refusal to recognize the Terminal Company as performing a part of the service on the ground that the wording of its own billing was insufficient to permit it to do so but did place it on the ground that such refusal was based upon the fact that to do so would be rebating and illegal. The position of the S. P. & S. comes exactly within the principle above quoted. It should be precluded now from raising said point because never taken until this litigation was started. If the position now taken by the S. P. & S. had ever been mentioned, there is no question that it would have speedily been changed. It should not be allowed to now react in favor of the S. P. & S. who could by its own billing have corrected it, if it was deemed by it essential. The McCarty case is a very largely quoted authority upon this principle. The other authorities cited under the proposition here discussed amply support the contention.

Additional Matters

There are certain additional matters which become material in the event of a reversal of this case. One is the question of the statute of limitations. The S. P. & S. has invoked against the plaintiff the limitation. First they invoked the six-year statute, later attempted to

invoke a three-year statute by rules of an accounting association to which association the defendant was not a member and hence not bound. The defendant claims that the method of accounting between the carriers constituted the accounting an open, mutual, current account and that therefore under the statute of limitations of Oregon the statute could not run except in the event of a break of a year between items. The defendant requested leave to present evidence on the nature of this account and the statute of limitations but the court denied such privilege, presumably on the basis that the decision would be in favor of the plaintiff and therefore not material. However, in the event of reversal we assume the case will be sent back, being a law action, and the defendant will have this opportunity to go into such question.

With reference to the question on the statute of limitations the plaintiff was claiming a limitation of but three years and refused to settle on the shipments paid for except for a period of three years and yet in the present case is seeking and has been permitted to recover for shipments moving more than three years prior to the commencement of the action. The complaint was filed September 20, 1933 (Tr. 2) and the shipments upon which recovery was permitted dated back to April 1, 1929. (See findings, Tr. 30). A rather inconsistent position.

We submit, therefore, that this case should be reversed on the grounds heretofore argued, to-wit: that the shipments were in fact from points on the line of the S. P. & S. to points on the line of the Terminal

Company and that the Terminal Company performed a transportation service in the course of the transportation of such shipments and was entitled to participate in the switching charge to the extent of receiving one-half thereof, and that the plaintiff is estopped on account of its conduct prior to litigation to claim any insufficiency in the billing and that said cause be remanded to the court below with the right in the plaintiff to retry the same on the basis of this court's decision and the right to offer testimony on the question of the character of the account between the parties hereto and show the number of shipments upon which it may be entitled to share in the freight charges.

Respectfully submitted,

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